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Federal Communications Commission
Office of Secretary

May 5, 1997

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VIA COURIER

Mr. William F. Caton
Acting Secretary
Federal Communications Commission
1919 M Street, N.W., Room 222
Washington, D.C. 20554

Re: Application for Review of Excel Telecommunications, Inc.

Dear Mr. Caton:

Enclosed for filing please find an original and four (4) copies of the Application for Review of Excel Telecommunications, pursuant to Section 1.115 of the Commission's Rules, CC Docket No. 96-128. Also enclosed is an extra copy to be stamped and returned.

Please direct any questions you may have regarding this filing to the undersigned of this office.

Respectfully submitted,



Dana Frix
Pamela Arluk

Its Counsel

cc: Attached Service List
J. Christopher Dance
Michael Romano

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**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

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MAY 5 1997

Federal Communications Commission
Office of Secretary

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|------------------------------------|---|----------------------|
| In the Matter of |) | |
| |) | |
| Implementation of the |) | CC Docket No. 96-128 |
| Pay Telephone Reclassification |) | |
| and Compensation Provisions of the |) | |
| Telecommunications Act of 1996 |) | |

**APPLICATION FOR REVIEW
OF EXCEL TELECOMMUNICATIONS, INC.**

Excel Telecommunications, Inc. ("Excel"), pursuant to Section 1.115 of the Federal Communications Commission's ("Commission") rules, 47 C.F.R. §1.115, hereby seeks reversal of the Common Carrier Bureau's ("Bureau") Order released April 4, 1997, in the above-referenced docket.¹ The Bureau's Order violates the Commission's Payphone Orders by permitting LECs to receive interim compensation prior to fully complying with the Commission's requirements for implementing its payphone regulatory scheme.

Excel has participated in the Commission's proceeding to deregulate the payphone marketplace in accordance with Section 276 of the 1996 Telecommunications Act ("1996 Act"). Excel filed initial comments in response to the Commission's Notice of Proposed Rulemaking, released on June 4, 1996.² In this Application for Review, Excel challenges the recent decision by the Bureau to grant a "limited waiver" to local exchange carriers ("LECs") that permits these LECs

¹ *Implementation of the Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996*, CC Docket No. 96-128, Order, DA-678 (rel. Apr. 4, 1997) ("Waiver Order").

² *See Comments of Excel Telecommunications*, CC Docket No. 96-128 (filed July 1, 1996).

to receive a substantial amount of funds under the Commission's interim flat-rate compensation mechanism prior to complying with the balanced deregulation schedule promulgated in the *Payphone Order*³ and reaffirmed in the Commission's *Reconsideration Order*⁴ in this docket. Specifically, Excel objects to the Bureau's decision in the most recent *Waiver Order* to permit the Regional Bell Operating Companies ("RBOCs") and other LECs to receive flat-rate interim compensation from interexchange carriers ("IXCs") for payphone services starting April 15, 1997, even though the LECs will not have filed federal tariffs complying with the Commission's orders in this docket until as late as May 19, 1997.⁵ By permitting LECs to collect substantial revenues from IXCs such as Excel prior to any federal review of their compliance with the Commission's carefully designed payphone rules, the Bureau plainly undermined the Commission's attempt and the Congressional requirement to "promote competition among payphone service providers."⁶ Accordingly, the Commission must reverse the Bureau's decision by prohibiting the LECs from receiving interim compensation until their federal tariffs are filed and effective.

³ See *Implementation of the Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996*, CC Docket No. 96-128, Report and Order, FCC 96-388 (rel. Sept. 20, 1996) ("*Payphone Order*").

⁴ See *Implementation of the Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996*, CC Docket No. 96-128, Order on Reconsideration, FCC 96-439 (rel. Nov. 8, 1996) ("*Reconsideration Order*"), at ¶131.

⁵ *Waiver Order*, at ¶ 21.

⁶ 47 U.S.C. § 276(b)(1) (1996); *September 20 Order*, at ¶2.

I. THE PAYPHONE ORDER REQUIRES LECs TO FULLY COMPLY WITH THE COMMISSION'S REQUIREMENTS BEFORE RECEIVING INTERIM COMPENSATION

The RBOCs filed various petitions in response to the *Payphone Order* asking the Commission to allow all LECs to receive compensation under the interim flat-rate compensation mechanism. In its *Reconsideration Order*, the Commission, while permitting the LECs to participate in the flat-rate compensation mechanism, explicitly warned, "We must be cautious, however, to ensure that LECs comply with the requirements set forth in the [*Payphone Order*]." ⁷ Among the six significant requirements noted by the Commission, the Commission required each LEC to have *effective* interstate tariffs removing certain subsidies and excessive costs by April 15, 1997. ⁸ The Commission required the LECs to file these tariffs to ensure that the LECs would not simultaneously be receiving anticompetitive subsidies *and compensation from IXCs*. ⁹

By allowing LECs to recover interim compensation prior to compliance with this integral part of the Commission's carefully established competitive safeguards, the Bureau has flatly rejected the Commission's admonition to remain "cautious" in permitting RBOCs and other LECs to receive compensation like other payphone service providers ("PSPs"). Given the Commission's own warnings in this paragraph of the *Reconsideration Order*, the Commission surely must have delegated oversight of compliance with these requirements to the Bureau out of a sense of cautious administration, not to allow LECs to receive double compensation for their payphone services. As

⁷ *Reconsideration Order*, at ¶131.

⁸ *Id.*

⁹ *See Payphone Order*, at ¶ 127.

the Commission plainly noted in its *Reconsideration Order*: “LECs will be eligible for compensation like other PSPs when they have *completed the requirements* for implementing our payphone regulatory scheme”¹⁰ The Bureau’s action in the *Waiver Order* thus contradicts the Commission’s own language, and must be reversed in light of the Commission’s clear intent to permit the RBOCs and other LECs to receive substantial flat-rate compensation amounts from IXC’s such as Excel only after the Commission determined that their tariffs do not contain any subsidies or reflect any excessive costs.¹¹

In its *Payphone Order*, the Commission clearly noted that permitting the RBOCs and other LECs to receive funds under the interim flat-rate compensation mechanism before complying with the reclassification requirements may likely have an anticompetitive impact on the payphone industry. In that Order, the Commission commented:

LEC participation both in providing payphones to the public and also providing the underlying tariffed payphone services to independent PSPs may give LECs the incentive and the potential ability to unfairly act to the detriment of their PSP competitors and to act in other anticompetitive ways against PSPs. However, *by implementing safeguards*, we intend to *ensure* that LECs cooperate fully in the provision of any necessary payphone services and do not otherwise restrain competition, as long as LECs remain the monopoly providers of these services.¹²

The Commission must continue to protect the industry against anticompetitive behavior, and must reinforce its commitment to competitive safeguards, and therefore, must reverse the Bureau’s

¹⁰ *Id.* (emphasis added).

¹¹ Pursuant to the Commission’s interim compensation scheme, Excel could be required to pay as much as **\$458,513.62 per month** if the LECs are allowed to receive compensation.

¹² *September 20 Order*, at ¶14 (emphasis added).

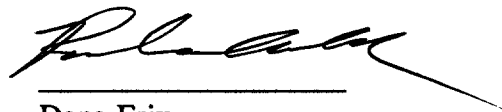
decision to permit the LECs to participate in the compensation scheme prior to their compliance with an integral portion of the Commission's safeguards.

In short, the Bureau's decision would allow the LECs to receive all of the benefits of the Commission's compensation mechanism without satisfying all of the Commission's requirements for receiving that compensation. Such a decision directly contradicts the cautious tone set by the Commission in its prior Orders in this docket, and permits RBOCs and other LECs to collect substantial sums of money from IXCs such as Excel without having effective interstate tariffs that reflect a truly competitive payphone marketplace.

II. CONCLUSION

For the foregoing reasons, Excel urges the Commission to reverse the Bureau's decision to allow the LECs to receive interim compensation from the interexchange carriers prior to complying with the Commission's interstate payphone tariff reclassification requirements. As demonstrated above, the Bureau's decision does not comport with the Commission's own statements on this issue nor the policy rationales underlying the Commission's Orders in this docket. The Commission must not permit RBOCs and other LECs to receive funds under the interim flat-rate compensation mechanism until these carriers have effective interstate tariffs that comply with the Commission's requirements set forth in this docket.

Respectfully submitted,



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Counsel for
EXCEL TELECOMMUNICATIONS, INC.

Dated: May 5, 1997

CERTIFICATE OF SERVICE

I, Jeannine Allen, hereby certify that on this 5th day of May, 1997, a copy of the foregoing **Application for Review of Excel Telecommunications, Inc., CC Docket No. 96-128**, was served on each of the following parties via courier, or by first-class mail, postage prepaid (as denoted by asterisk):

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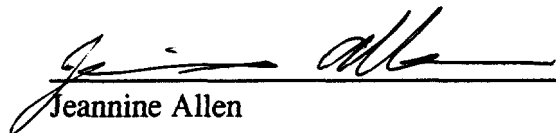
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